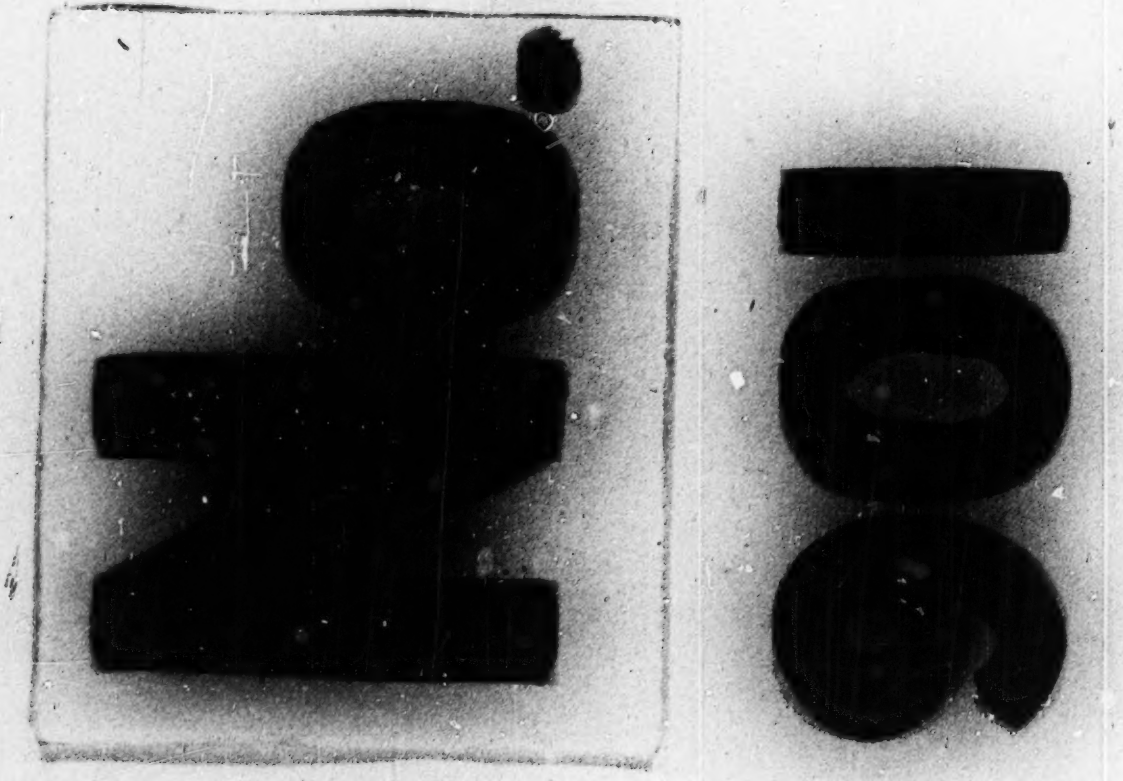

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 901

D. D. HARRINGTON, ET AL,

Petitioners,

v.

NATURAL GAS PIPELINE COMPANY OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NATURAL GAS PIPELINE COMPANY OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

D. D. Harrington, et al ("Petitioners") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on July 9, 1957, together with the *per curiam* opinion of that court dated March 5, 1958, denying Petitioners leave to file a second petition for rehearing.

The Respondent, Natural Gas Pipeline Company of America ("Natural"), filed a petition for writ of certiorari in this Court on February 24, 1958, which is limited to its claim for additional interest on the amount of restitution awarded by the court below. Petitioners filed a brief in opposition to Natural's petition, and notified the Court that they would file this petition for writ of certiorari requesting review of the entire judgment rendered by the court below.

OPINIONS BELOW

The original opinion and judgment of the Court of Appeals for the Fifth Circuit of July 9, 1957, is reported in 246 F. 2d 915, and is printed as Appendix "A" hereto, *infra* pp. 21-34. The *per curiam* opinion of the Court of Appeals, rendered March 5, 1958 (not yet reported), is printed as Appendix "B" hereto, *infra* pp. 35-36. The opinion and judgment of the District Court is reported in 139 F. Supp. 452, and is printed as Appendix "C" hereto, *infra* pp. 37-59.

JURISDICTION

The judgment of the Court of Appeals was entered on July 9, 1957. A petition for rehearing was filed by Petitioners on July 29, 1957, and was overruled on January 9, 1958. Petitioners' application for leave to file a second petition for rehearing was overruled by a *per curiam* opinion of the Court of Appeals dated March 5, 1958. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether state minimum price laws constituted a valid exercise of state regulatory power over matters of local concern *prior* to the time that the paramount federal authority was implemented by the Federal Power Commission in its Series 174 orders[1] issued during the summer and fall of 1954.

2. Whether in a suit for restitution of sums paid pursuant to the Oklahoma minimum price laws (legislation upheld by this Court in the *Peerless* case[2] but subsequently

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[1] Order No. 174 was issued July 16, 1954; Order No. 174-A was issued August 6, 1954, and Order No. 174-B was issued December 17, 1954.

[2] *Cities Serv. Gas Co.* v. *Peerless O. & G. Co.*, 340 U.S. 175 (1950).

declared invalid in the *Panoma* case[3]) recovery is a matter of right to be awarded on summary judgment and to be measured by a rigid legal formula without regard for the discretion of a court in equity to mold its decree according to the justice of the case.

3. Whether the determination by the court below of the rate to be charged for gas sold to Natural from August 1, 1952, to July 1, 1954, invades the plenary jurisdiction of the Federal Power Commission and violates the filed rate procedure established by the Natural Gas Act.[4]

4. Whether the existence of material issues of fact and the necessity for inquiry into the surrounding facts and circumstances in order that the equitable discretion of the court could be properly exercised precluded the rendition of a summary judgment.

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717 et seq., are set out in Appendix "D", *infra*, pp. 60-64.

STATEMENT OF THE CASE

Petitioners entered into a gas purchase contract with Natural effective December 1, 1946, whereby Petitioners agreed to deliver a stated quantity of gas to be produced from certain described gas reserves in the Guymon-Hugoton Field in Oklahoma, and Natural agreed to pay for each 1,000 cubic feet of gas delivered, a base price of 6¢ until July 1, 1951, and for the five years thereafter, 7¢ (R. 42-47). On December 9, 1946, the Oklahoma Corporation Commis-

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[3] *Natural Gas Pipeline Co.* v. *Panoma Corp.*, 349 U.S. 44, April 11, 1955.

[4] Natural Gas Act, 15 U.S.C.A. Sections 717-717w.

sion fixed a minimum price of 7¢ for all gas removed from the Guymon-Hugoton Field (Order 19514) (R. 22, 23). Natural superseded this order by posting bond and made no payment thereunder (R. 23, 24). The validity of this minimum price order was upheld by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 175, (1950).

A second minimum price order (No. 26096) fixing a minimum price of 9.8262¢, was issued by the Oklahoma Corporation Commission on July 29, 1952 (R. 48-49). Natural did not avail itself of the opportunity to file a supersedeas bond without surety, but notified Petitioners that it would pay the minimum price and that all payments in excess of the contract price were being made under protest (R. 8-10, 25). Natural commenced to pay in accordance with the minimum price order but initiated an appeal therefrom. In *Natural Gas Pipeline Co.* v. *Corporation Commission*, 272 P. 2d 425 (April 27, 1954), the Supreme Court of Oklahoma upheld the order but upon appeal to the United States Supreme Court the order was held invalid, 349 U.S. 44, (April 11, 1955).

Pending appeal, as a result of the payments by Natural Petitioners paid the royalty owners and the Oklahoma production tax on the basis of the 9.8262¢ which was being received by it from Natural. From August 1, 1952, to July 1, 1954, extra royalty amounting to $237,000.00 and extra Oklahoma production taxes amounting to $84,279.00, an aggregate of $321,279.00, was paid by Petitioners (R. 25, 134). In addition, Petitioners had paid extra royalty and production taxes under the first minimum price order in the aggregate amount of $412,000.00 although Natural had not made any payments in accordance with such order (R. 23, 134). It is undisputed that these increased royalty and tax payments were necessary to continue in force the leasehold interests which contained the gas reserves dedi-

cated under the gas purchase contract with Natural (T. 23, 134).

Natural brought suit to recover by way of restitution the difference, for the period from August, 1952, to June, 1954, inclusive, between the amount actually paid by it for gas delivered by Petitioners referrable to the contract of December 1, 1946, and the amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6% (R.1). Federal jurisdiction was based upon diversity of citizenship of the parties (R. 1). The aggregate contract price for the entire period was $2,827,656.48, and the aggregate amount paid under the order was $4,451,426.71, a difference of $1,623,770.23. On March 22, 1956, the Honorable Joe E. Estes, United States District Judge for the Northern District of Texas, entered summary judgment in favor of Natural against the Petitioners for the sum of $1,302,491.23, but in the exercise of his equitable discretion allowed Petitioners countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Petitioners as increased royalties and $84,279.00 paid as increased gross production taxes under the second order (R. 134, 135). Furthermore, Judge Estes found that it was just and equitable to refuse interest on the amount awarded (R. 134, 135).

On July 9, 1957, the United States Court of Appeals for the Fifth Circuit affirmed the award of the District Court, but disallowed the countervailing equities in the amount of $321,279.00 allowed by the District Court, and rendered judgment in favor of Natural against the Petitioners for the full sum of $1,623,770.23 (App. 30-31). The Court of Appeals also reversed the District Court's denial of interest and awarded Natural interest at 6% per annum from April 11, 1955, on all amounts remaining unpaid down to the date of payment (App. 31).

Petitioners' original petition for rehearing was overruled on January 9, 1958 (R. 229). Thereafter, on March 5, 1958, by a *per curiam* opinion, the Court of Appeals denied Petitioners leave to file a second petition for rehearing because the court considered that the question of whether the Oklahoma minimum price laws were valid prior to the exercise of federal authority had been decided by this Court in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (Supp. R. 23, App. 35).

REASONS FOR GRANTING THE WRIT

This request for review presents for the first time, important federal questions which are of vital concern to the many producers of natural gas in Oklahoma and Kansas who received payments in excess of their contract prices pursuant to the minimum price laws promulgated by the regulatory agencies of those states. Such payments were received with the assurance of this Court in *Ohio Fuel Gas Co. v. Peerless O. & G. Co.*, 340 U.S. 175 (1950), that minimum price laws were a proper exercise of state regulatory power. Accordingly, in order to protect the gas reserves dedicated under their contracts, these producers paid royalties and production taxes on the basis of the increased payments. Subsequently, pursuant to the mandate contained in the *Phillips* case,[3] the Federal Power Commission implemented its jurisdiction over rates for natural gas by the issuance of its Order No. 174 on July 16, 1954. Thereafter, in *Natural Gas Pipeline Co. v. Panoma Corp.*, 349 U.S. 44 (April 11, 1955), it was determined that the Oklahoma minimum price law conflicted with this administrative implementation of the paramount federal authority and therefore was invalid. However, in the *Panoma* case this Court did not seek to determine whether such state

[3] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

minimum price law was valid or invalid prior to the time that the federal authority was exercised.

Now this Court is confronted with the issue of whether, in an equitable action for restitution, Petitioners are obligated to refund all or any part of the amounts in excess of their contract price collected from August, 1953, to June, 1954, inclusive. Before Petitioners are liable to refund all or any part of such increased amounts, it must first be determined that state minimum price laws were invalid during the period prior to the regulation of rates of independent producers by the Federal Power Commission, i.e. prior to July 16, 1954, when the federal jurisdiction was first implemented by Order No. 174. In turn, the answer to this question is dependent upon a determination of whether Congress intended to preclude such state action by the mere enactment of the Natural Gas Act, and thereby create a hiatus until the Commission acted, or whether the existing state power was to remain unimpaired until the Commission implemented its jurisdiction. These are important federal questions with industry-wide consequences, which urgently call for determination by this Court for the first time. The recent decision by this Court in *Cities Service Gas Co. v. Kansas* (decided on January 23, 1956), holding the Kansas minimum price law invalid, compounds the financial and legal impact of this case and reinforces the necessity for review.

POINT I.

The Court of Appeals Erroneously Interpreted the Panoma Case and Rendered a Decision Inconsistent With Other Decisions of This Court.

1. *The Court Below Has Misread the Panoma Decision and Extended It Far Beyond Its Scope.*

In determining that Natural was entitled to restitution of all amounts ($1,623,770.23) in excess of the contract price paid to Petitioners pursuant to the second Oklahoma minimum price law for August, 1952, to June, 1954, inclusive, the Court of Appeals assumed that the mere enactment of the Natural Gas Act in 1938 prevented the State of Oklahoma from subsequently regulating the minimum price for gas taken from the Guymon-Hugoton Field despite the fact that the federal authority lay "dormant and unexercised." Inherent in this assumption is a limitation upon the power of a state to enter an order concededly necessary in the interest of conservation, prevention of waste and protection of correlative rights in a natural gas reservoir, even though the Federal Power Commission had made no attempt to regulate these matters. The court below based its assumption upon the decision of this Court in *Panoma*, and erroneously relied upon that decision as determining that the Oklahoma minimum price laws were invalid from their inception (Supp. R. 23-24). This was an unwarranted expansion of the *Panoma* case.

In *Panoma*, this Court determined that the Oklahoma minimum price law conflicted with the paramount federal jurisdiction over rates for natural gas which had been implemented by the Series 174 orders issued by the Federal Power Commission, but did not seek to determine the retroactive invalidity of the Oklahoma minimum price law, and, indeed, that issue was not before the Court for decision, and was not urged in the argument or briefs presented to the Court. It was mentioned by Justice Douglas in his dissent, but there is nothing in the briefs or record to show that this point was passed upon by the Court. It was not a point material to the decision in that case and would have been *obiter dictum*. The sole question was whether the Oklahoma minimum price law could continue to stand in

the face of the regulations promulgated by the Federal Power Commission. This Court expressly stated that the result reached was controlled by the *Phillips* case in which the validity of prior state regulation was not discussed. An examination of the *Panoma* and *Phillips* cases shows that they are readily distinguishable on the facts and issues presented and are not determinative of this proceeding.

The composite effect of the *Panoma* decision was to vitiate the Oklahoma minimum price law, because federal jurisdiction had been implemented by the Series 174 orders promulgated by the Federal Power Commission during the summer and fall of 1954, and thus, *at that time*, the theretofore valid state regulations were superseded. It is, therefore, clear that the court below misread *Panoma* when it ruled that this Court had determined that the Oklahoma minimum price law was invalid prior to the time the Commission implemented its jurisdiction.

2. ***The Decision of the Court of Appeals Is Inconsistent with the Decisions of this Court Which Sustain the Validity of State Regulatory Action "Where Federal Power Has Been Delegated But Lies Dormant and Unexercised."***

The assumption by the court below that the mere existence of the Natural Gas Act made the Oklahoma minimum price orders void *ab initio*, disregards and ignores the decisions of this Court which firmly establish that merely because Congress has vested regulatory power in a federal agency, that does not of itself displace state regulation if no federal standards are set. *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Terminal R. Asso.* v. *Brotherhood of Trainmen*, 318 U.S. 1 (1943); *Northwestern B. T. Co.* v. *Nebraska State R. Co.*, 297 U.S. 471 (1936); *Missouri P. R.*

Co. v. *Larabee Flour Mills Co.*, 211 U.S. 612 (1909). This fundamental principle underlying the demarcation between federal and state authority was cogently summarized in *Missouri P. R. Co.* v. *Larabee Flour Mills Co., supra,* where the Court stated:

> "In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens."

In each case, the effect of federal legislation on state regulation is a matter of congressional intent as derived from the statute itself, its primary purpose and the judicial construction that has been placed thereon. *Guss* v. *Utah L.R.B.*, 353 U.S. 1 (1957). In the *Guss* case this Court was confronted with a problem very similar to the one which is presented here, and in determining that Congress preempted the field by merely enacting the National Labor Relations Act, the Court made the following statement:

> "Our reading of Section 10(a) forecloses the argument based upon such cases as *H. P. Welch Co.* v. *New Hampshire*, 306 U. S. 79, 83 L. Ed. 500, 59 S. Ct. 438, and *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U.S. 612, 53 L. Ed. 352, 29 S. Ct. 214, that 'where federal power has been delegated but lies dormant and unexercised,' *Bethlehem Steel Co.* v. *New York State Labor Relations Board, supra,* (330 U.S. at 775), the states' power to act with respect to matters of local concern is not necessarily superseded. *But in each case the question is one of congressional intent.* Compare *H. P. Welch Co.* v. *New Hampshire* (U.S.), *supra,* with *Napier* v. *Atlantic Coastline R. Co.*, 272 U.S. 604, 71 L. Ed. 432, 47 S. Ct. 207." (Emphasis supplied.)

Therefore, the crucial question in this proceeding, and one which the court below failed to determine because of its erroneous interpretation of the *Panoma* case, is whether, by the enactment of the Natural Gas Act, Congress intended to curtail state power prior to the implementation of the paramount federal authority provided therein.

Section 16[6] of the Natural Gas Act grants the Federal Power Commission the power to issue, make, amend and rescind such orders, rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act, and further specifically provides that:

> "Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe."

As evidenced by many decisions of this Court, the fundamental congressional purpose underlying the Natural Gas Act was to complement and supplement, insofar as possible, the existing state jurisdiction over matters of local concern. *Public Power Com.* v. *United Fuel Gas Co.*, 317 U.S. 456 (1943); *Federal Power Com.* v. *Hope Nat. Gas Co.*, 320 U.S. 591 (1944). See also *Panhandle E. Pipeline Co.* v. *Public Serv. Com.*, 332 U.S. 507 (1947). When this underlying purpose is considered in conjunction with Section 16 of the Act, it shows that Congress did not intend to supersede or preclude state regulation over matters of local concern, such as the Oklahoma minimum price laws, until the paramount federal authority over such matters had been exercised by the Commission.

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[6] Section 16 of the Natural Gas Act is printed in full in Appendix "D" hereto, *infra*, pp. 63-64.

The Oklahoma minimum price laws constituted valid state regulations prior to July 16, 1954, when the Commission first implemented its jurisdiction and, therefore, the court below erred in holding that Natural was entitled to restitution of all amounts in excess to the contract price paid to Petitioners from August, 1952, to June 1954, inclusively, pursuant to the second Oklahoma minimum price law. Because this error is based upon an erroneous interpretation of a decision of this Court, involves important federal questions, and has a wide-spread effect, it necessitates corrective action by this Court by writ of certiorari. See 11 Oklahoma Law Review 65.

POINT II.

The Decision Rendered By the Court Below Completely Disregards the Existence of the Oklahoma Minimum Price Laws and Erroneously Subjects the Equitable Remedy of Restitution to a Rigid Legal Formula.

1. *Even If Unconstitutional, the Oklahoma Minimum Price Laws Were Not Without Operative Effect.*

Another facet of the assumption by the court below that the Oklahoma minimum price laws were void *ab initio*, is the fact that its decision gives them no effect whatsoever. The decision is predicated on the theory that such state regulation was unconstitutional and therefore had no effect on Natural's right to restitution. In proceeding on this basis, the decision of the court below is in conflict with the opinion of this Court in *Chicot Co. Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940), wherein Mr. Chief Justice Hughes made the following statement regarding the effect of a statute which has been declared unconstitutional:

"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton* v. *Shelby County*, 118 U.S. 425, 442, 30 L. Ed. 178, 186, 6 S. Ct. 1121; *Chicago, I&L R. Co.* v. *Hackett*, 228 U.S. 559, 566, 57 L. Ed. 966, 969, 33 S. Ct. 581. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justifiably be ignored.* The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of the courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." Emphasis supplied.

Thus, even though unconstitutional, the Oklahoma minimum price laws were an operative fact and it was incumbent upon the court below to consider their effect on the actions taken by Petitioners in reliance on their validity, i.e., the $412,000.00 the Petitioners paid as extra royalty and production taxes as a result of the first minimum price order (R. 23), and the $321,379.00 paid by Petitioners as extra royalties and production taxes under the second Oklahoma minimum price order as a result of Natural's increased payments

(R. 25, 134). The failure of the court below to give the Petitioners any credit for such payments made in reliance on the validity of the Oklahoma minimum price laws violates the doctrine enunciated in the *Chicot Co. Drainage* case. This doctrine is particularly applicable in the present action for restitution since equitable considerations are paramount, and furthermore, because Petitioners made such increased royalty and tax payments not only in reliance upon the statutes themselves but also in reliance on the determination by this Court in *Peerless* that such laws were valid.

The court below erred in failing to recognize that the Oklahoma minimum price laws, even though unconstitutional, were a prime consideration in determining Natural's right to restitution. This error unjustifiably inflicts severe financial hardship on Petitioners, and since such inequity results from a failure of the court below to follow a decision of this Court, it should be corrected by granting this petition for writ of certiorari.

2. *The Established Law of Restitution.*

Assuming *arguendo* that the state minimum price laws were void *ab initio*, the hundreds of producers of natural gas in Oklahoma and Kansas who received payments pursuant to the minimum price laws of those states in excess of their contract price, could hardly have been expected to have the prophetic vision necessary to foresee that the minimum price laws would be held invalid only four years after they were held valid. Yet, now they are called upon to refund the total amount of the increased payments plus interest, despite the fact that a large portion of such amounts was paid to third parties as royalties and taxes to preserve and protect the leasehold interests dedicated under the gas purchase contracts.

The injustice and unfairness in requiring producers to refund the total amount of such increased payments plus interest at this time, irrespective of the equities of the case, is manifest, and is contrary to the fundamental principles of equity underlying the remedy of restitution pronounced by this Court and expressed by Justice Cardozo's opinion in *Atlantic Coastline R. Co.* v. *Florida*, 295 U.S. 301 (1935). During the course of his opinion Justice Cardozo clearly recognized that the essence of the equitable remedy of restitution was the discretion vested in a court of equity to make its determination according to the justice of the case:

> "'Restitution is not of mere right. It is *ex gratia* resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it, nor where the process is set aside for a mere slip' (Citing cases). 'In such cases the simple but comprehensive question is whether the circumstances are such that equitably the defendant should restore to the plaintiff what he has received.'"

In accordance with the mandate contained in *Atlantic*, the District Court determined that equitably the Petitioners herein were entitled to certain countervailing equities, and that under the circumstances it was just and equitable to deny Natural's claim for interest. However, with utter disregard for the equitable considerations underlying the District Court's decision, the Court of Appeals arbitrarily determined, as a matter of law, that since Natural was not legally bound to make the payments to Petitioners, it was entitled to full restitution as a matter of right, together with interest thereon. Nowhere in its opinion does the Court of Appeals acknowledge that the determination of Natural's right to restitution and the awarding of interest thereon were matters of equitable discretion which could not be disturbed on appeal except for clear abuse. The Court of

Appeals simply applied rigid legal principles to the facts and refused to apply any considerations of equitable principles in deciding the case. This is not the law of restitution. To permit this decision to remain in its present posture is to ingraft an unwarranted limitation on the discretion of a court in equity to grant or deny restitution according to the justice of the case as it is commanded to do by the decision of this Court in *Atlantic*.

POINT III.

The Decision Rendered Below Determines the Rate To Be Charged For Gas Sold and Delivered by Petitioners to Natural From August 1, 1952, to July 1, 1954, and Thereby Invades the Plenary Jurisdiction of the Federal Power Commission, and Violates the Filed Rate Procedure Established by the Natural Gas Act.

1. *The Filed Rate Is the Only Legally Enforceable Rate.*

Section 4 of the Natural Gas Act (15 U.S.C. 717c) provides for the filing of rates and the machinery whereby these rates may be increased; Section 5 of the Act (15 U.S.C. 717d) provides machinery whereby the Commission on a proper complaint can attack the filed rates and have them reduced. These sections relating to rate regulation have been described by this Court as "the heart of the new regulatory system." *Federal Power Com.* v. *Hope Nat. Gas Co.*, 320 U.S. 591, 611 (1944). Thus, the very core of the regulatory scheme created in the Natural Gas Act is the observance of the filed rate as the only legal rate, and no deviation or modification can be recognized unless established pursuant to the prescribed procedure. To sanction an unfiled rate violates the whole statutory scheme and defeats the congressional purposes in enacting the Natural

Gas Act. The decision of the court below awarding Natural $1,623,770.23 enforces the contract rate of 6.253¢ per Mcf. which was not the filed rate, and, therefore, not a legally enforceable rate.

The contract rate in this case was subject to the exclusive jurisdiction of the Federal Power Commission and should have been filed with the Commission. The lack of knowledge of the parties is no excuse and the fact that the contract was not filed with the Commission did not alter the situation or in any way divest the Commission of the jurisdiction given it under the Act. In order to effectuate a legal rate in the present case, the Natural Gas Act required that the contract rate be filed with the Federal Power Commission. No rate other than the filed rate was valid or legally enforceable, and the court below was without power or jurisdiction to fix a rate applicable to the period in question. *Montana-Dakota Util. Co.* v. *Northwestern P.S.C.*, 341 U.S. 246 (1950).

2. *No Filed Rate—No Enforceable Rate—No Judicial Rate.*

The parties were without knowledge that they were violating the law or that their action was wrongful. Had the Petitioners realized that they were considered a natural gas company, they would have filed a just and reasonable rate without reference to the contract, and upon appropriate findings the Commission could have fixed a just and reasonable rate. The Act leaves no area for the courts to act in fixing a rate for the past, and Congress has denied this authority even to the Commission. *Federal Power Comm.* v. *Hope Nat. Gas Co., supra.* The parties were in *pari delicto,* and the transaction having been completely executed, the Court should leave the parties where it found them. *Second Russian Ins. Co.* v. *Miller,* 268 U.S. 552

(1925); *Harriman* v. *Northern Securities Co.*, 197 U.S. 244 (1905).

The recovery allowed Natural is contrary to the policy expressed in the Natural Gas Act that every enforceable rate must be based on a contract filed with the Federal Power Commission. There was no legal rate from August 1, 1952, to July 1, 1954, and it was error for the court below to effectuate the contract rate of 6.253¢ Mcf. by granting Natural restitution. Such action by the court below constitutes an unwarranted judicial invasion of the administrative province and disregards the filed rate procedure established by the Natural Gas Act. This is a blow at the foundation of the regulatory scheme intended by Congress and requires the interposition of this Court by writ of certiorari.

POINT IV.

The Existence of Material Issues of Fact and the Necessity for Inquiry Into the Surrounding Facts and Circumstances in Order That the Equitable Discretion of the Court Could Be Properly Exercised Precluded the Rendition of a Summary Judgment.

1. *Summary Judgment Was Premature.*

Natural's suit against Petitioners is predicated on the equitable remedy of restitution. This equitable remedy is not a matter of right, but is *ex gratia*, resting in the sound discretion of the Court. *Atlantic Coastline R. Co.* v. *Florida*, 295 U.S. 301 (1935). It is a proceeding where a full disclosure of the background facts which motivated the parties is not only desirable, but is a prerequisite to the exercise of the judicial discretion and a correct application of the law. By its very nature the issues involved in an

action for restitution are ill-adapted to summary ajudication and generally require the full exploration of a trial.

Here, the basic question is whether the circumstances are such that equitably Petitioners should restore to Natural all or any part of the amounts which they received in excess of their contract price pursuant to the Oklahoma minimum price law from August 1, 1952, to July 1, 1954. The answer to this controlling question is dependent upon the determination of certain subsidiary issues of fact. Why did Natural supersede the first minimum price order and yet pay the second under protest? Did Natural voluntarily pay the increased price under the second order? Did Natural comply with the 9.8262¢ rate in order to obtain a rate increase from the Federal Power Commission? Was Natural's action actuated by a deliberate desire to place it in a strategic bargaining position with Petitioners? Or, were the excess payments made in response to some form of "business duress"? Did Natural pay a reasonable price for the gas under the invalid order? If any restitution is to be allowed, is it equitable under all the circumstances to make the producer bear the burden of the added royalties and increased production taxes paid because of the first minimum price order? Did Petitioners actually threaten to shut down their wells unless Natural paid the minimum price established by the Oklahoma Corporation Commission? Or was this merely a figment of Natural's imagination? A determination of these questions, which were raised by Petitoners' pleading in the District Court, could not be made on motion for summary judgment because they involve issues of fact which had to be determined to properly qualify the court below to exercise its equitable discretion and make its award "according to the justice of the case." The mere existence of these material questions of fact indicates that summary judgment was premature, and since they involve considerations which

were the heart of Justice Cardozo's opinion in *Atlantic*, the failure to determine such crucial issues is in direct conflict with a decision of this Court.

CONCLUSION

This test case involves important federal questions which concern the effect and application of the Natural Gas Act; its legal and financial consequences are far-reaching; the Court of Appeals has erroneously interpreted the *Panoma* case, and this error has resulted in a judgment which is in conflict with other decisions of this Court. Therefore, for these reasons, it is in the ultimate public interest to grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16206

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant and Appellee,

v.

D. D. HARRINGTON, ET AL,
Appellees and Appellants,

(AND REVERSE TITLE)

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

(July 9, 1957)

Before **BORAH, RIVES** and **BROWN,**
Circuit Judges

RIVES, Circuit Judge: Restitution was sought by Natural from Harrington[1] for the difference between the contract

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[1] To avoid confusion, particularly from the cross-appeals, D. D. Harrington, et al, and their predecessors in interest, Panoma Corporation, will be collectively referred to as "Harrington", and Natural Pipeline Company of America as "Natural".

rate for the purchase of natural gas and the price paid in compliance with an order of the Oklahoma Corporation Commission which was later declared invalid by the United States Supreme Court. The district court found Natural entitled to restitution in the sum of $1,302,491.23. It deducted from the restitution claimed $321,279.00, being $237,000.00 paid by Panoma as increased royalties and $84,279.00 paid as increased gross production taxes, and allowed no interest prior to the date of the judgment. Both Harrington and Natural appeal.

Harrington insists that Natural is not entitled to any restitution; Natural contends that the court erred as to each of the several sums deducted, and in denying it full restitution plus interest. Since the district court rendered summary judgment, we must, in examining each of the questions, determine whether there was any genuine issue as to any material fact and whether the judgment was right as a matter of law.

Judge Estes' excellent opinion, reported in 139 F. Supp. at 452, et seq., relieves us of the necessity for making more than a brief statement of the facts. Under the contract effective December 1, 1946, and to endure so long as gas is produced in paying quantities, Harrington had agreed to sell to Natural the gas produced from Harrington's wells located in some 78,000 acres of gas reserves in the Guymon-Hugoton Field in Texas County, Oklahoma, at 7 cents per m.c.f. measured at 16.4 pounds per square inch, equivalent to 6.253 cents when measured at 14.65 pounds pressure and 60 degrees Fahrenheit. On December 9, 1946, a few days after the effective date of the contract, the Oklahoma Corporation Commission entered its first order fixing a minimum price of seven cents for all gas measured at 14.65 pounds and 60 degrees Fahrenheit removed from the Guymon-Hugoton Field. Natural refused

to comply with this order, and, on May 17, 1951, the Oklahoma Commission directed Natural to pay the difference between the contract price and the seven cents minimum price. Natural posted bond and superseded the order. No payments were ever made under that first order.

On July 29, 1952, the Oklahoma Commission issued its second order increasing the minimum price to 9.8262 cents. The effective date of this order was delayed until September 10, 1952. On September 9, 1952, Natural notified Panoma, Harrington's predecessor, that it would appeal from the order and would *not* supersede, but (repeated with each payment) that it would pay the 9.8262 cents under protest, and would, upon success in the appeal, seek restitution for the amounts paid in excess of the contract price with lawful interest thereon.

Without considering the Natural Gas Act enacted by Congress in 1938, 52 Stat. 833, 15 U.S.C. §717v, the Supreme Court had in 1950 upheld the validity as against certain constitutional objections of the first Oklahoma minimum price order. *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179. Following the landmark case of *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, the second order was declared invalid on April 11, 1955, because "such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission." *Natural Gas Pipeline Co.* v. *Panoma Corporation, et al.*, 349 U.S. 44.

Meanwhile, on July 1, 1954, pursuant to a plan for liquidation, Panoma transferred all its assets to its stockholders, Harrington, et al., the defendants below. The consent of Natural to certain assignments of the contract incident to such transfer was required, and, in consideration of Natural's consent, Harrington, et al., executed a letter containing the following obligation:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligations imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

Harrington, et al. resold the major portion of the assets to third persons, and received therefor $40,000,000.00 in cash plus other valuable considerations. The restitution here sought is for claimed overpayments for gas delivered between September 10, 1952, the effective date of the second Oklahoma minimum price order, and July 1, 1954, the date of sale of Harrington's assets.

Harrington's principal defense is based upon the equitable nature of the remedy of restitution so clearly expressed by Mr. Justice Cardozo in *Atlantic Coast Line RR Co.* v. *Florida*, 295 U.S. 301, 309, 319. In that case, an order of the Interstate Commerce Commission requiring an increase of intrastate rates because discriminatory against interstate commerce had been set aside "solely upon the ground that the facts supporting the conclusion were not embodied in the findings" (295 U.S. 311). The Commission thereafter "looked into the past and ascertained the facts. In particular it looked into the very years covered by the claims for restitution and found the inequality and injustice inherent in the Cummer rates during the years they were in suspense and during those they were in force." (295 U.S. 312).

"By the time that the claim for restitution had been heard by the master and passed upon by the reviewing court, the Commission had cured the defects in the form of its earlier decision. During the years affected by the claim there existed in very truth the unjust discrimination against interstate commerce that the earlier decision had attempted to correct. If the processes of the law had been instantaneous or adequate, the attempt at correction would not have missed the mark. It was foiled through imperfections of form, through slips of procedure * * * as the sequel of events has shown them to be." 295 U.S. at pp. 311, 312.

The Supreme Court directed that the claims for restitution be dismissed, holding that the federal court "discovers through the evidence submitted to the Commission and renewed in the present record that what was charged would have been lawful as well as fair if there had been no blunders of procedure, no administrative delays." (295 U.S. at 315). See also *United States* v. *Morgan*, 307 U.S. 183, 196.

Harrington calls attention that in the instant case the order of the Oklahoma Commission was not invalidated on its merits, or because the rate of 9.8262 cents was unjust or unreasonable, but simply because exclusive jurisdiction was vested in the Federal Power Commission, and that that Commission, by its order of November 14, 1955, accepted as the present effective rate of Harrington's successor in interest, the same 9.8262 cents.

It should further be noted, however, that the invalidity of the order of the Oklahoma Commission was not caused by any defect or imperfection of form or slip of procedure but resulted from a total lack of jurisdiction. Further, the Federal Power Commission by its order of November 14, 1955, spoke for the future only, and did not possess the power enjoyed by the Interstate Commerce Commission in the *Atlantic Coast Line case, supra*, of looking into the past

and ascertaining the facts. Nor does any court possess such power for the purpose of fixing retroactively a just, reasonable, and lawful rate. Here the parties themselves had fixed the rate to be charged by their solemn and binding contract, and that contract rate could be changed only by the Federal Power Commission after a hearing conducted in accordance with Section 5(a) of the Natural Gas Act. *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U.S. 332. Moreover, in the *Atlantic Coast Line case, supra*, the railroad carrier was entitled to the protection of the order of the Interstate Commerce Commission against being required to accept the unreasonably low intrastate rates, while here the primary aim of the Natural Gas Act was "protection of consumers against exploitation at the hands of the natural gas companies." *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 685 (concurring opinion of Mr. Justice Frankfurter). Even the Federal Power Commission, which had exclusive jurisdiction, could increase the contract rate only because of considerations of the public interest and not on account of any claimed right of Harrington to relief from an improvident bargain. *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355.

True, in *United Gas Pipe Line Co.* v. *Mobile Gas Corporation, supra*, the contract was filed with the Federal Power Commission, and here it was not so filed. Section 4(c) of the Natural Gas Act provides that:

> "Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices,

and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services."

Until the decision in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the parties, and indeed the Commission itself, had proceeded upon the assumption that the Commission had no regulatory jurisdiction over the rates of independent producers. After that decision, the Commission, by its Orders 174 and 174A, entered July 16, 1954 and August 6, 1954, respectively, fixed the time within which such producers could file their rates. Since the *Phillips* decision, it has become clear to all of the parties that the contract should have been filed with the Commission. The failure to file it earlier, however, did not prevent the jurisdiction of the Commission from attaching. *Interstate Natural Gas Co.* v. *Southern California Gas Co.*, 9th Cir., 209 F. 2d. 380, 384. There is nothing in the Natural Gas Act or in the orders of the Federal Power Commission to indicate that, under such circumstances, until the rates were filed there was *no* effective or lawful rate. To the contrary, the Act expressly provided for delay in such filing, and under the rationale of *United Gas Pipe Line Co.* v. *Mobile Gas Corporation, supra,* the contract rate, even though unfiled, became and remained the only lawful rate until changed by order of the Federal Power Commission. Any price in excess of the contract rate was then contrary to the spirit, if not the letter, of the Natural Gas Act.

Harrington insists, however, that the excess payments were voluntarily made by Natural, or at least that there was a genuine issue of fact as to whether they were involuntarily made under coercion of "business duress." Natural, of course, concedes that restitution will not lie if the excess

payments were voluntarily made.[3] Further, duress or coercion must exist, and the written protest does not, by itself, make the payments involuntarily. *Union Pacific RR Co.* v. *Dodge County Commissioners*, 98 U.S. 541, 544; *Bank of United States* v. *Bank of Washington*, 6 Pet. 8, 12 (U.S. 1832).

The order of the Oklahoma Commission directed,

> "That no gas shall be produced from any well located in the Guymon-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet if sold at the wellhead or on the lease or drilling unit from which produced, or a price equivalent to not less than 9.8262¢ per thousand cubic feet at the wellhead if sold off the lease or drilling unit or otherwise utilized."

Assuming validity of the order, its violation carried criminal sanctions under an Oklahoma Statute (O.S., Title 52, Sec. 278) providing for a fine of not to exceed $5,000.00 or imprisonment in the county jail for not more than thirty days, or both such fine and imprisonment on those who violate its conservation laws. Mr. T. Murray Robinson, counsel for Panoma, Harrington's predecessor, filed an affidavit in which he conceded:

> "That after said order was entered, Mr. Coleman Hayes, who represented Natural Gas Pipeline Company of America in said proceedings, visited with me by telephone concerning the effect of said order on the relationship of Panoma and Natural. In the course of that conversation I told Mr. Hayes that in my opinion as a lawyer the order of the Commission would become binding unless superseded and that Panoma, like all others, would be compelled to abide thereby, and that in my opinion the order directed producers who were not receiving the minimum price to cease deliveries."

[3] For the basic reason of that rule, see 40 Am. Jur., Payment, Sec. 158.

Scant respect would be accorded to the laws of the State of Oklahoma, if it were held that Natural had to go further and speculate on whether Panoma actually would have ceased delivering gas if Natural had refused to pay the increased price.

Natural candidly admits that it was motivated not to supersede the order by its desire to seek from the Federal Power Commission increases reflecting the prices paid under the order, and thus to pass on the increase rather than itself bearing the entire risk. We do not agree with Harrington that such motive converted Natural's payment of the increased rate into a "calculated business maneuver." If anything, the choice between bearing the entire risk of loss and trying to pass it on increased the business duress on Natural to make payments in accordance with the order. See *Union Pacific RR Co.* v. *Public Service Commission*, 248 U.S. 67, 70.

Further, Harrington urges that the duress was not imposed by it but was exerted by the Oklahoma Commission. We need not stop to consider whether duress of a third person will suffice (see Restatement of Restitution, Sec. 70b), for, under the circumstances, the Oklahoma Commission was a representative of Harrington and other producers similarly situated. *Arkadelphia Milling Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 146; see, also, *United Gas Pipe Line Co.* v. *Mobile Gas Corporation*, 350 U.S. 332, 347.

Harrington urges that an accord and satisfaction was effected by Panoma's acceptance of Natural's checks containing notations similar to that copied in the margin.[3] It

[3] "Acceptance of this check constitutes full payment of and settlement for the account described on the statement attached
* * *

Payment of gas purchased on original and supplemental contracts from June 23, 1954 to 10:00 A.M. July 1, 1954."

is elementary, however, that an accord and satisfaction can result only from an agreement, and, clearly, Natural made no offer of any agreement that would preclude it from seeking restitution when each of its checks was accompanied by a letter specifically renewing its protest as follows:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

We are in full agreement with the conclusion reached by the learned district judge that Natural is entitled to restitution.

The district court, however, denied Natural's claim for restitution in the sum of $321,279.00 representing payments made by Panoma, Harrington's predecessor, for increased royalties and increased production taxes. We have held that Panoma had no right to the increased price. It took the same with notice that the rights of all who were to share in such increase were disputed by Natural. It could not voluntarily pay its royalty owners and its taxes on the basis of the increased price at Natural's expense, when the validity of the increase was in dispute. *Ward* v. *Love County*, 253 U.S. 17, 24.

We think that the state law provided adequate means by which Panoma could have withheld the increased payments from its royalty owners until the termination of the litigation, or could have paid under protest with a right of recovery, or could reserve the right to itself or its successors to take credit for any overpayment against future royalties. Panoma received the increase in price for the use and bene-

fit of Natural, but it made no effort to protect Natural's interest.

Like considerations are applicable to the payments of taxes on the basis of the increased price. Additionally, it may be noted that Title 68, Section 1475 of the Oklahoma Statutes, 1951, provides for the payment of taxes under protest and their subsequent recovery. Indeed, the Fourteenth Amendment itself would prevent the state from collecting unlawful taxes by coercive means without incurring any obligation to pay them back. *Ward* v. *Love County*, 253 U.S. 17, 24. We hold, therefore, that the district court erred in denying Natural's claim for restitution to the extent of $321,279.00.

We agree with the district court that the clear intent of the letter of the stockholders, Harrington, et al., incident to Panoma's liquidation (see page 4, ante) was to assume the same liability that rested upon Panoma. We think, however, that its use of the expression "with lawful interest" referred to interest from and after the time when Natural might become entitled to restitution from such stockholders in lieu of Panoma. Ordinarily, a person liable to make restitution is under a duty to pay interest from the time he commits a breach of duty in failing to make restitution. Restatement of Restitution, Sec. 156(b). The duty to make restitution arose on April 11, 1955, when the Oklahoma order was declared invalid by the Supreme Court of the United States. Previous to that date, Panoma's acceptance of the increased price had been due, not to its fault or volition, but simply to the requirement that it comply with the order of the Oklahoma Commission, and for such period previous to April 11, 1955, we think that interest should not be allowed. See *The Claim of Jacobs* v. *Adams, Executor*, 1 Dallas 52 (U.S. 1781).

The district court denied the recovery of any interest, without seeking to take advantage of its discretionary power to refuse interest (*Okeechobee County, Florida* v. *Nuveen*, 145 F. 2d. 684, 687), but fully and fairly stating the reasons for such denial.[4] Each of those reasons was known to the parties on July 1, 1954, when Harrington, et al. agreed to pay Natural "any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952." Further, with deference, we disagree with the reasons assigned by th learned district judge. In our opinion, no duty rested on Natural to supersede the order, Natural's suggestion of an escrow arrangement should not prejudice its right to interest, and though it had received increased rates from its customers, such increase was granted subject to the provision recited in the order of the Federal Power Commission, that if Natural be successful in the litigation, "* * * it will refund to its utility customers, on a basis to be approved by the Commission, the sum or sums so recovered."

Finally, we find that there was no genuine issue as to any material fact and that Natural was entitled to judgment as a matter of law. Rule 56(c), Federal Rules of Civil Proce-

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[4] "As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money."

dure. While the judgment might be affirmed in the part complained of in Harrington's appeal and reversed in the part complained of in Natural's appeal, it is simpler, we think, to vacate the entire judgment and remand the cause with directions to enter judgment in accordance with this opinion in favor of the plaintiff against the defendants for the sum of $1,623,770.23, together with interest at 6 per cent per annum from April 11, 1955 on such sum or any portions thereof remaining unpaid down to the date of payment, and with costs, and it is so ordered. The costs of this appeal are taxed against D. D. Harrington, et al.

VACATED AND REMANDED.

(SEAL)

A true copy

Test: EDWARD W. WADSWORTH

Clerk, U. S. Court of Appeals, Fifth Circuit, New Orleans, Louisiana.

JUDGMENT

Extract from the Minutes of July 9, 1957

No. 16206

NATURAL GAS PIPELINE COMPANY OF AMERICA,

v.

D. D. HARRINGTON, ET AL.

(AND REVERSE TITLE)

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, vacated; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, D. D. Harrington, and others, and the surety on their appeal bond herein, National Surety Corporation, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16206

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellant and Appellee,

v.

D. D. HARRINGTON, ET AL.,
Appellees and Appellants,

(And Reverse Title)

APPLICATION FOR LEAVE TO FILE SECOND PETITION FOR REHEARING

(March 5, 1958)

Before BORAH, RIVES and BROWN, Circuit Judges.

PER CURIAM: Leave to file a second petition for rehearing is denied. *Natural Gas Co.* v. *Panoma Corp.*, 349 U.S. 44. The notation of Mr. Justice Douglas's dissent shows that the Court considered the question presented by this second petition for rehearing. See also the recent per curiam opinions of the Supreme Court in No. 85, *Cities Service Gas Co.* v. *State Corporation Commission of Kansas*, decided January 20, 1958; and in No. 86 *Michigan*

Wisconsin Pipe Line Co. v. *Corporation Commission of Oklahoma,* No. 111 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* No. 112 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* No. 113 *Phillips Petroleum Co.* v. *Corporation Commission of Oklahoma,* decided January 27, 1958, 26 L.W. 3219.

Leave to file

DENIED.

APPENDIX "C"

IN THE

District Court of the United States

FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

NATURAL GAS PIPELINE COMPANY OF AMERICA, a Corporation,
Plaintiff,

v.

D. D. HARRINGTON, ET AL,
Defendants.

Civil Action
No. 2070

Plaintiff seeks restitution for the difference in its contract rate for the purchase of gas and the price paid under an invalid minimum rate order of the Oklahoma Corporation Commission. Plaintiff has moved for summary judgment.

The uncontroverted facts in this case are as follows:

Defendants and others under the firm name of Harrington and March, called "Sellers", being the owners of mineral leases covering 78,000 acres of land in the Guyman-Hugoton gas field, in the County of Texas and State of Oklahoma, entered into a "Gas Purchase Contract" effective December 1, 1946, with plaintiff, herein called "Natural", an interstate pipeline transporter of natural gas, whereby it was agreed that (1) Natural would expand its facilities, including construction of certain pipelines and a compressor station at a point designated in the contract; (2) Sellers would drill wells, install gathering lines, construct a gasoline and dehydration plant, etc., and maintain

and operate their property so as to make available for delivery the agreed quantities of gas; (3) Sellers would sell and deliver to Natural, and Natural would purchase and receive from Sellers stipulated quantities of gas per day; (4) said gas would be delivered to Natural at the intake side of its compressor station and by it compressed and redelivered to Sellers at Sellers' gasoline plant, where Sellers would remove certain constituents, including liquid hydrocarbons; (5) Sellers would redeliver the residue gas to Natural at its meter station near the outlet side of Sellers' plant, at which point title should pass to Natural; (6) Natural would pay for each thousand cubic feet of gas delivered, a base price (with certain adjustments for BTU's) of (a) until July 1, 1951, six cents, and (b) for five years thereafter, seven cents, the quantity delivered to be measured at a base temperature of 60° F. and an absolute pressure of 16.4 pounds per square inch (which prices are equal to 5.35974 cents and 6.253 cents per M.c.f. respectively for gas measured at 14.65 pounds pressure) with a slightly different price provision applying to gas used for fuel by Natural in its compressor station.

As to payment, the contract provided that Natural would render monthly statements to Seller showing the quantities of gas delivered, with supporting data, whereupon Sellers would render an invoice for such gas, and Natural would make payment; that if Natural should fail to pay any amount due, to the extent not in bona fide dispute, for a period of sixty days after its due date, Sellers could suspend deliveries of gas until such payment was made; that any statement or invoice was to be subject to correction within one year after payment made by Natural for gas delivered during any calendar month, but if claim for correction was not made within that time, such statement and invoice would become final as to both parties;

that Natural might at its option make payments of any amounts due by deposit to Sellers' "credit in the First National Bank and Trust Company of Oklahoma City".

It was further provided that:

> "This contract is subject to present and future valid laws and present and future lawful orders of all regulatory bodies now or hereafter having jurisdiction over the parties; and should at any time during the term of this contract either party, by force of any such law or regulation imposed, be ordered or required to do any act inconsistent with the provisions of this contract, the contract shall, subject to the other provisions hereof, continue nevertheless, but shall be deemed modified to conform with the requirements of such law or regulation."

It recited, among other things, that Natural contemplated the expenditure of large sums of money in the construction of pipe lines to Sellers' properties and:

> "because of such expenditures and because the nature of its business requires assurance that the gas reserves of Seller shall be continuously available to Natural during the entire period of this contract, the parties agree: that the provisions hereof shall be deemed covenants running with . . . the property . . . "

Deliveries of gas under the contract commenced in small quantities in August 1948. On about October 1, 1948, Panoma Corporation was created by the members of the Harrington and Marsh partnership, and the gas properties, together with all rights under the contract, were transferred to it. Deliveries by it of gas in substantial quantities commenced in November 1948, and continued thereafter.

This contract was an important one to both parties, and on August 1, 1952 and thereafter, the gas deliverable under it constituted a substantial portion of Natural's source of supply.

Under date of July 29, 1952, Oklahoma Corporation Commission (herein referred to as the State Commission), upon:

> "application of certain mineral owners in Texas County, Oklahoma, for an order determining the minimum price at which gas in the Guyman-Hugoton Field may be first purchased or sold",

entered its order No. 26096, providing that:

> "No gas shall be produced from any well located in the Guyman-Hugoton Field of Oklahoma except at a price of not less than 9.8262¢ per thousand cubic feet at the wellhead. . . . If the gas is processed for extraction of liquid hydrocarbons and sold during or at the conclusion of gathering, the price for the residue gas shall be not less than 9.8262¢ per thousand cubic feet" (with certain adjustments for BTU content).

Under this order gas was to be measured at 14.65 pounds per square inch absolute. Its effective date, August 1, 1952, was temporarily stayed by Commission order of July 31, 1952, until September 10, 1952,

> "during which time the appealing parties and all other parties interested who desire to further stay the enforcement of said order may file herein their supersedeas bonds, said bonds to be approved by the Commission."

A further hearing was had on September 10, 1952 to consider the "terms, conditions and amounts" of supersedeas bonds. No supersedeas bond was filed or proffered by Natural or Panoma. Such a supersedeas was filed by another pipeline company (Northern Natural), which is material here only as indicating one form of "bond" which was acceptable to the Commission. It constituted merely an undertaking, without surety, to perform "all things that may duly and legally be enjoined upon it by said order in

case said order shall be finally affirmed in whole or in part." It appears from the affidavit of the attorney who represented the mineral owner applicants for the order that this was a form of "bond" agreed to by him, and that if requested, he, as attorney for these mineral owners, would have agreed to the same form of bond for Natural.

Under date of August 26, 1952, Natural wrote Panoma, referring to Order No. 26096, and stating among other things:

> "You have informed us that you interpret such order as applying to the gas sold by Panoma to this Company . . . and have also informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract), you will discontinue the delivery of gas . . . to us in accordance with the provisions of such contract. . . ."

The letter continued that Natural denied that the order could lawfully be applied to their gas; that it had filed notice of appeal, which it would prosecute; that pending final adjudication it was necessary that the gas be delivered to Natural in order that it might fulfill its obligations to its customers and provide supplies of gas to consuming areas served by it in accordance with its certificates of public convenience and necessity; that it could not replace said gas from any other source, on any reasonable basis; that its rights and the rights of its consuming public could not be adequately protected through the filing of a supersedeas bond; that it was necessary that its rights be protected and preserved pending the appeal; and stated:

> "Natural will therefore, each month, upon receipt of proper accounting statements, pay in accordance with the contract price and, in addition thereto, will make payments for the difference between such contract

price and the price fixed by the Commission for such gas in said order.

"Payments of all sums in excess of the contract price, however, will be made involuntarily and under protest because of the compulsion and coercion resulting from the threat of the order itself and your interpretation of such order as prohibiting you from producing and delivering such gas to Natural under said contract at a price less than the minimum price fixed by the Commission in such order.

"You will understand, of course, that such payment of such differences is and will be made involuntarily and under protest because of the compulsion and coercion of the order and the threat of the enforcement of the terms of such payment. In the event such order should be held invalid or inapplicable to the gas sold and delivered by you to us under such contract, Natural will assert the right under familiar doctrines of business compulsion, unjust enrichment and restitution to a return to Natural of the additional payments so made under protest, with lawful interest thereon."

It further suggested that by agreement the "additional amounts" be held in escrow by the bank pending final determination as to the order, all claims for interest to be waived.

Under date of August 30, 1952, the President of Panoma wrote the President of Natural, on the letterhead of Panoma, stating that Natural's letter had been submitted to "our attorneys" in Oklahoma City for recommendation and advice; that Mr. T. Murray Robinson, who was most familiar with the matter (and who, it may be noted, was the same attorney who represented the mineral owners whose application resulted in the order in question) was on vacation; that his associates were of the opinion that it would be contrary to Panoma's interests to agree to the suggested escrow agreement, but preferred to await his return

before stating their objections in writing; and suggesting a different agreement, stating, "We feel that the present order will undoubtedly be sustained."

Under date of September 9, 1953, Natural wrote Panoma a second letter, identical with its letter of August 26, except that it omitted (1) the statement that its rights and the rights of the consuming public could not be adequately protected by the filing of a supersedeas bond, and (2) the suggestion for an agreed escrowing of the payments above the contract price.

Natural did appeal from the order. It was held valid in its entirety by the Supreme Court of Oklahoma April 27, 1954,[1] but on appeal to the United States Supreme Court, that Court in a per Curiam opinion[2] April 12, 1955, held the order invalid, (and controlled by *Phillips v. Wisconsin*[3], decided on June 7, 1954) holding:

> "that such a sale and transportation cannot be regulated by a state but are subject to the exclusive regulation of the Federal Power Commission."

Meantime, pending the appeal:

1. At Panoma's request, payments for gas delivered under the contract were made to the First National Bank and Trust Company of Oklahoma City, Trustee for Panoma, until those for April, May and June 1954, which were, in accordance with Panoma's instructions, made direct to it. As provided in the contract, Natural furnished Panoma each month a statement of the quantities and BTU content of gas delivered, and Panoma submitted its invoice. Pano-

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[1] Natural Gas Pipeline Company of America v. Corporation Commission of Oklahoma (Sup. Ct. of Okla.) 272 P. 2d 426.

[2] Natural Gas Pipeline Company of America v. Corporation Commission of the State of Oklahoma et al, 349 U.S. 44, 99 L. Ed. 866.

[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

ma's invoices, beginning with that dated September 11, 1952, for gas delivered in August 1952 showed the price per M.c.f. computed at the price fixed by the State Commissioner's order. Natural issued its voucher check for the amount of the invoice, showing on the voucher portion the date, aggregate amount and the words, "Payment of gas purchased during the month of .....", or similar language, and transmitted it to the payee with a letter of transmittal stating:

> "Such payment is, as to any part thereof in excess of that payable under the price provisions of said contract, made involuntarily and under protest with full reservation of all rights to seek restitution thereof as is more particularly set forth in our letter to Panoma Corporation dated September 9, 1952, a copy of which is attached hereto for your information."

Each such check had printed on it the words: "acceptance of this check constitutes full payment of and settlement for the account described in the statement attached."

A schedule attached to the complaint herein, the correctness of the computation being admitted in defendant's answer, itemizes by months, from August 1952 to June 1954 inclusive, the contract price and the amount actually paid under the State Commission's order. It shows the aggregate contract price for the entire period to have been $2,827,656.48, and the aggregate amount paid under the order $4,451,426.71, an "excess" of $1,623,770.23 (the amount for which plaintiff sues). It also shows a computation of interest at 6% to July 31, 1955 on the excess of each monthly payment, totaling $178,004.32.

2. Natural made certain applications to the Federal Power Commission for increased rates and for approval of revised tariff sheets, which were allowed by that Com-

mission by orders of December 9, 1953 and March 30, 1955. It is inferable that Natural included in support of its applications the increased price it was paying Panoma. Each of the orders of the Federal Power Commission allowing the increased rates provided for a refunding by Natural to its customers, on a basis to be approved by the Commission, of any amounts recovered by it from Panoma.

3. Panoma paid its royalty owners, and the Oklahoma production tax, on the basis of the 2.5263 cent order. From August 1, 1952 to July 1, 1954 Panoma paid to its royalty owners, because of the difference between the contract price and the 2.5263 cent price actually being received from Natural extra royalty and taxes amounting to $237,000.00, and extra Oklahoma production taxes amounting to $84,279.00. The sums so paid aggregated $321,279.00.

4. As of July 1, 1954, pursuant to an "Agreement and Plan of liquidation of Panoma Corporation", that corporation conveyed to its then stockholders, viz., the defendants herein, in stated unequal amounts, all of its assets including the contract with Natural. The major portion of these assets were simultaneously resold by defendants (to Dorchester Corporation) for $40,000,000.00 in cash and other valuable considerations. To obtain Natural's consent to this transfer, defendants made an agreement set forth in a letter dated July 1, 1954 from them to Natural, which recited the transfer of Panoma's assets in liquidation, stating that they were conveying certain of the properties referred to in Natural's letter to Panoma of September 9, 1952, and continued:

"It was understood that your execution and delivery of a certain instrument dated June 25, 1954, consenting to the assignment of the Gas Purchase Con-

tract from Panoma Corporation to us, and from us to third persons, was contingent upon your obtaining the following agreement on our part, to-wit:

"That we hereby jointly and severally agree on behalf of ourselves, our executors, administrators and assigns to pay you or cause to be paid you any sums of money with lawful interest thereon which you are entitled to have refunded or returned with respect to the payments to Panoma Corporation in excess of the contract price made under protest referred to in said letter of September 9, 1952. We do also jointly and severally, for ourselves, our heirs, executors, administrators and assigns agree to and do hereby acknowledge and assume any obligation imposed upon Panoma Corporation by virtue of the letter you addressed to it under date of September 9, 1952."

In this suit plaintiff seeks to recover from the defendants by way of "restitution" the difference, for the period from August 1952 to June 1954 inclusive, between the aggregate amount actually paid by it for gas delivered by Panoma referable to the contract of December 1, 1946, and the aggregate amount which would have been paid on the basis of the prices fixed by the contract, with interest at 6%. The case is now before the court on two motions by the plaintiff, (1) a Motion to Strike certain allegations of defendants' answer as insufficient, immaterial and impertinent, and (2) a Motion for Summary Judgment.

As I have determined to render a Summary Judgment on the plaintiff's motion, I deem it unnecessary to make any formal order on its Motion to Strike.

The facts hereinabove recited are uncontroverted. It remains to consider whether or not there is a genuine issue as to some other material fact, such that evidence thereon should be heard before proceeding to judgment. In briefs and argument, defendants urge that there is such an issue

as to (1) whether or not Panoma threatened to shut down its wells unless Natural paid the increased price fixed by the order of the State Commission; (2) whether or not the price fixed by contract was non-compensatory, and (3) because the remedy of restitution is equitable in nature, "all of the surrounding facts and circumstances" should be gone into.

Plaintiff alleges that Panoma, through its counsel, informed plaintiff that it expected to comply with the order, and construed it to require discontinuance of deliveries under the contract unless payments were made at the price set forth in it. The defendants deny, alleging that Panoma did not at any time threaten or inform Natural that it would discontinue any delivery.

The affidavit of Panoma's then President states that at no time did Panoma "or any of its authorized officers, agents, attorneys, or employees inform or advise Natural . . . that in the event (Natural) did not pay the amount in said price order provided or supersede same that Panoma Corporation would cease deliveries . . . " nor did Natural inquire of Panoma whether it would do so.

It appears from the affidavit of Panoma's attorney, Mr. T. Murray Robinson, that after the order was entered, Natural's attorney, Mr. Coleman Hayes, visited with him by telephone concerning the effect of said order on the relationship of Panoma and Natural, in the course of which conversation he told Mr. Hayes that in his "opinion as a lawyer, the order of the Commission would become binding unless superseded and that Panoma, like all the others, would be compelled to abide thereby", and that in his opinion "the order directed producers who were not receiving the minimum price to cease deliveries", and further that he "did not tell Mr. Hayes what Panoma would do, as I had no authority to so say."

Whether or not Panoma, in terms, threatened to discontinue deliveries if Natural did not meet the increased price, I do not consider to be of controlling materiality. It is uncontroverted that the order specifically forbade the production of gas from any well in the field except at the price designated; that the President of Panoma, in the letter of August 30, 1952 to the President of Natural, stated that "we feel that the present order will undoubtedly be sustained by the courts", which letter was in response to Natural's August 26, 1952 letter to Panoma stating that "you have informed us that, unless payments be made by us at the minimum price set forth in such order (instead of the price set forth in such contract) you will discontinue the delivery of gas" and contained no disavowal of such intention; that Panoma, by its Vice President, on September 9, 1952, wrote Natural that Panoma, contemplating a possible revision of the contract, would invoice Natural at 9.8262¢ for both the gas which was being delivered under this contract and certain other gas which was being delivered under a different contract providing a higher price, but that if the contract was not revised, "we reserve our rights to collect at a later date the difference between 9.8262¢ . . ." and the higher price for such other gas, which they later did; that when, on September 11, 1952 Panoma rendered its invoice to Natural for all gas delivered in August, it did so at the price fixed by the State Commission order, not at the contract price, and that it continued each month thereafter to render its statements to Natural on that basis for the gas delivered under the contract here in question. To the extent that any "threats" by Panoma might be thought to be essential to the existence of "business duress", I think the order itself, coupled with these uncontroverted facts, sufficiently show that Natural had a right to believe itself in imminent dan-

ger of having an important supply of gas interrupted if it did not accede to the order-fixed price, and that it was not discouraged in this belief by anything Panoma did — if, indeed, it would have been entitled to rely even on affirmative assurance from Panoma that it would violate the terms of the order by continuing deliveries at the contract price.

As to defendants' suggestions that there exists a genuine issue of fact on the question of whether or not the contract price was non-compensatory, I do not consider that an issue material to my decision. It is not my province to determine in this proceeding what would or would not have been a fair price for gas during the period in question. This would be true had the original price been fixed by an erroneous or invalid Commission order. (See *State Corporation Commission of Kansas* v. *Federal Power Commission*.[4]) And is all the more true here since the price now complained of by the defendants as non-compensatory was fixed by the arms length contract of the parties themselves.

I think the suggestion that there may be other "facts and circumstances" which would make an issue in the light of the equitable character of the remedy sought by the plaintiff is too indefinite to make a genuine issue as to a material fact. Counsel in argument and in response to my questions, indicated no particular material fact or circumstance which would be disputed; none are pleaded; and I believe the suggestion relates rather to the inferences and conclusions to be drawn from the uncontroverted facts already in the record than to any real dispute of fact.

As I see it, therefore, there is no genuine issue as to any material fact; the case is one for summary judgment; and it remains to consider what judgment should be rendered. Certain collateral contentions of the parties may be first considered.

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[4] 215 P. 2d 176.

1. Plaintiff contends that the defendants' letter of July 1, 1954, unconditionally bound them to repay the excess payments sued for, with interest, if the order should be held invalid. I do not agree. I construe the letter only to bind the defendants to pay whatever plaintiff would be entitled to recover against Panoma, and that the questions as to recovery *vel non*, and the amount of any recovery, are the same as they would be were Panoma the defendant.

2. Defendants contend that there was an accord and satisfaction as to the amount due for gas each month, and point (1) to the printed notation on the face of each of Natural's checks reading "acceptance of this check constitutes full payment of and settlement for the account described on the statement attached" and the written notation on the voucher portion of each check to the effect that it was for payment of gas purchased under the contract for a particular month, and (2) to the provisions of the contract that any statement or invoice should be subject to correction within one year but should become final "if claim for correction is not made within that time." Each of Natural's checks was accompanied by a letter renewing its rights to such restitution as set forth in its letter of September 9, 1952. It seems clear that there was no accord and satisfaction, and that the parties did not so intend.

3. Defendants contend that to permit Natural to recover the difference between the contract price and what it paid for the gas pursuant to the invalid order would be enforcing the price provisions of the contract as the rate for gas during the period in question, whereas it is now known that Panoma was a natural gas company within the provisions of the Natural Gas Act, whose rates could only be valid after filing with the Federal Power Commission; that the contract never having been so filed, its provisions as to price were

ineffective. Admittedly, neither of the parties supposed at that time that Panoma was required to file its rate schedules (contracts) with the Federal Power Commission, and it is a matter of common knowledge that that Commission itself did not know or believe that it had jurisdiction over the prices charged by gas producers for their product until after the decision in *Phillips* v. *Wisconsin*, June 1954.[3] To say now that Panoma, regardless of knowledge or lack of it, was under the legal duty to file its rates (viz., its contract) with the Commission and that its failure to do so had the effect of preventing the price provisions of its private contract from becoming binding as between the parties is highly technical and without merit in determining the equities of the parties. The authorities cited by the defendants do not require such a holding. I am not here concerned with the proposition that the parties could not by their contract oust the Federal Power Commission of its power to determine the lawfulness of rates. During the period here involved the Commission has not determined the contract rates applicable to this gas unlawful, nor prescribed a change therein. I decline to follow the defendants' contention in this respect. See *Mobile Gas Service Corp.* v. *Federal Power Commission*,[5] citing *Colorado Interstate Gas Company* v.

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[3] Phillips Petroleum Co. v. Wisconsin, et al, 347 U.S. 672, 98 L. Ed. 1035 (June 7, 1954).

[5] Mobile Gas Service Corp. v. Federal Power Commisison, 215 F. 2d 883, ... U.S. ....., affirmed by opinion of the Supreme Court Feb. 27, 1956 in cases Nos. 17 (United Gas Co. v. Mobile Gas Corp.) and 31 (F.P.C. v. Mobile Gas Corp.) — Oct. Term 1955, in which Justice Harlan's opinion states:

> ". . . we hold that the Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action. . . .
>
> "From our conclusion that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally, it follows that the new schedule filed by United was a nullity insofar as it purported to change the rate set by its

Federal Power Commission.[6]

4. Defendants further contend that recovery by plaintiff is barred (a) because Natural could have superseded the order of the State Commission and did not, (b) because Natural, by obtaining orders of the Federal Power Commission for increased rates, passed on to its customers the excess payments to Panoma, and (c) by the two year statute of limitations. I have carefully considered each of these contentions, and find them to be without merit. The remedy of "restitution" originated in the field of judgments paid and later reversed, and there could be no occasion for its application in a case where the judgment had been superseded. With respect to judgments, it is said in *Restatement of the Law, Restitution*, Sec. 74 (p. 304)[7] that "anything

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contract with Mobile and that the contract rate remained the only lawful rate. . . . Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments. Cf. Baltimore & Ohio R. Co. v. United States, 279 U.S. 781."

Justice Harlan's opinion in cases Nos. 51 (F.P.C. v. Sierra Pacific Power Co.) and 53 (Pacific Gas Co. v. Sierra Pacific Power Co.) dated Feb. 27, 1956, affirming 223 F. 2d 605, construing provisions of the Federal Power Act virtually identical to the Natural Gas Act, states:

" . . . The Commission has undoubted power . . . to prescribe a change in contract rates whenever it determines such rates to be unlawful. While this power is limited to prescribing the rate 'to be thereafter observed' and thus can effect no change prior to the date of the order. . . . "

" . . . But while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Railroad Comm'n, 261 U.S. 379.

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[6] Colorado Interstate Gas Company v. Federal Power Commission, 142 F. 2d 943, affirmed 324 U.S. 581.

[7] Restatement of the Law, Restitution Sec. 74, (p. 304).

paid by way of settlement can be recovered . . . although the payer could have obtained a supersedeas." No reason is perceived why Natural owed any duty to Panoma to supersede the order. The suggestion that because it could have superseded, it was not put under any "business duress" by the order, if valid, would apply as well in principle to the field of judgments. As to the "passing on" by Natural to its customers, I do not consider that its rights in this suit are affected thereby, especially in view of the fact that the Federal Power Commission's orders granting it increased rates especially provide for refunds by it to its customers, of whatever amounts it should recover from Panoma. And as to the statute of limitations, the cause of action (for restitution) here asserted did not arise until the event happened on which the right to it depended, viz., the final determination of the invalidity of the State Commission's order, which was not until April 11, 1955, less than five months prior to the commencement of this action. *(Baltimore and Ohio Ry. Co.* v. *U.S.*[8]*)*. Accordingly, I hold against the defendants on each of these contentions.

This narrows the matter down to the controlling issues of law, viz., is Natural entitled, under the facts, to the remedy of restitution, and if so, is it entitled to recover the entire amount sued for, or are there countervailing reasons, equitable and otherwise, for limiting its recovery to a lesser amount?

I have heretofore indicated my conclusion that in making the "excess" payments Natural involuntarily did so under the coercion of "business duress." It was confronted with an apparently valid order of the State Commission which in terms forbade its supplier from supplying gas to it unless it paid the designated price. If it refused to pay, enforcement

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[8] Baltimore and Ohio R.R. Co. v. U. S., 279 U.S. 781, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

of the order would subject it to very great loss. If the order was valid, refusal to pay might be a violation of its own contract. A prior price-fixing order of the same Commission (the so-called 7-cent order of December 8, 1946) had been held valid, as against constitutional objections, by the Supreme court.[9 & 10] Natural certainly would not have been justified in ignoring the order or assuming it to be invalid. Defendants now assert that Natural should have known that Panoma would not comply with the order, because shutting down its wells would have shut off its own supply of gas for processing in its plant. Panoma's attitude at the time did not indicate that it intended to defy the order. It was quite to the contrary. But I doubt that even assurances from it that it would do so would have entirely eliminated the coercion resulting from the order itself, containing within its own terms the implication that the State Commission would exercise its powers of enforcement. While Natural's letters to Panoma of August 26 and September 9, 1952, and its continued reiteration that it was making the excess payments under protest, could not of themselves create a cause of action for restitution, they made it clear, and make it clear now, that Natural considered itself to be paying under coercion and that Panoma was so continually and unequivocally informed.

The remedy of "restitution" is a branch of the more general "money had and received," which is based on the proposition that where one has received money from another under such circumstances as to make it unjust and inequitable for him to retain it, he may be required to restore it. In general, and with limitations, "a person who has been unjustly

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[9] Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 95 L. Ed. 190 (Dec. 11, 1950).

[10] Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, 95 L. Ed. 204.

enriched at the expense of another is required to make restitution to the other." *Restatement of the Law, Restitution*, p. 12. So, "what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter, in the event of a reversal, by the litigants opposed to him, the beneficiaries of the error". (See dissenting opinion of Justice Cardoso in *Reed* v. *Allen*.[11]) If taxes have been paid under the duress of an unconstitutional act, they may be recovered. *State* v. *Akin Products Co.*[12] In the case cited, the Texas Supreme Court adopted the opinion of the Court of Civil Appeals, including the following language from *Crow* v. *City of Corpus Christi*[13]:

> "The early common-law doctrine of duress has been expanded (17 Am. Jur. p. 875) and many courts have adopted the modern doctrine of 'business compulsion' under which 'it is established that where by reason of the peculiar facts a reasonably prudent man finds that in order to preserve his property or protect his business interest it is necessary to make a payment of money which he does not owe and which in equity and good conscience the receiver should not retain, the payment may be recovered.' 40 Am. Jur. p. 831."

The principle of business duress has been applied to permit recovery of payments made under compulsion of an administrative order later held invalid. *Baltimore and Ohio R.R. Co.* v. *U. S.*,[14] *Mobile Gas Service Corp.* v. *Federal Power Commission*.[15] I hold that it is applicable here, and that Natural is entitled to recover the excess payments, ex-

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[11] Reed v. Allen, 286 U.S. 191, 76 L. Ed. 1054.

[12] State v. Akin Products Co. (Texas Supreme Court Jan. 4, 1956) 25 Tex. Sup. Ct. Reporter 177, affirming 279 S.W. 2d 409.

[13] Crow v. City of Corpus Christi, 146 Tex. 558, 209 S.W. 2d 922, cited in the Supreme Court opinion in the Mobile case, Note 5 supra.

[14] Baltimore and Ohio R.R. Co. v. U.S., 279 U.S. 781.

[15] Mobile Gas Service Corp. v. Federal Power Com., 215 F. 2d 883, affirmed by the Supreme Court. See Note 5 supra.

cept to the extent that countervailing equities make it unjust for it to do so. The remedy of restitution is not a rigid legal right, and in applying it I conceive it to be the court's duty to limit the recovery to the amount which, under the circumstances, in equity and good conscience, should be restored.

> "The claimant to prevail must show that the money was received in such circumstances that the possession will give offense to equity and good conscience if permitted to retain it. . . .
> The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it. . . .
> ". . . 'Restitution is not of mere right. It is *ex gratia* resting in the exercise of a sound discretion . . ." Cardozo, J., in *Atlantic Coast Line R.R. Co.* v. *State of Florida.*[16]

I hold that there are countervailing equities to the extent of $321,279.00, being $237,000.00 paid by Panoma to its royalty owners as royalty and $84,279.00 paid by it as increased gross production taxes, out of and by reason of the "excess payments" by Natural. These amounts were not retained by Panoma, but were paid out by it, and in my opinion necessarily so. To have withheld payment of royalty on a portion of the amount currently being paid for the gas by Natural would almost certainly have precipitated difficulties with the royalty owners, possibly to the extent of claims for cancellation of leases, avoidance of which inured to Natural's benefit. In making its payments, Natural is bound to have known that Panoma would have to pay out a part of the "excess payments" as royalties and gross production taxes. I believe it to be just and equitable to reduce the re-

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[16] Atlantic Coast Line R.R. Co. v. State of Florida, 295 U.S. 301, 79 L. Ed. 1451.

covery allowed Natural in this case below the entire amount sued for, by the sum of $321,279.00.

I cannot, however, follow the suggestion of defendants that I should also take into account some $412,000.00 in royalties and taxes paid out by Panoma prior to August 1, 1952, by reason of the difference between the contract price and the price promulgated by the State Commission in its prior order of December 9, 1946 (the so-called "7-cent" order). Natural made no payments above the contract price prior to August 1, 1952, nor by reason of the 7-cent order, and the amounts so paid out by Panoma have no connection with the restitution sued for.

As to the matter of interest, I have concluded that it is just and equitable, under the circumstances of this case, to deny plaintiff's claim for interest. In so concluding, I have taken into account all the facts and circumstances before me, including the fact that Natural could have superseded the operation of the order as to this gas, and kept the use of the money, by filing a mere undertaking without surety or penal amount (as did Northern Natural Gas Company); that it was willing to waive interest if Panoma would agree to the escrowing of the excess payments; and that for most of the period in question it has been able to recoup the excess payments by increased rates to its customers, so that it has not in fact been deprived of the use of the money.

I therefore hold that Natural is entitled to recover from the defendants the sum of $1,302,491.23, with interest only from the date of the judgment. In view of the defendants' letter agreement of July 1, 1954, I hold further that this recovery shall be from the defendants jointly and severally.

Counsel for plaintiff may submit a form of judgment, for consideration after notice to counsel for defendants.

DONE at Dallas, Texas, this 9th day of March 1956.

JOE E. ESTES
United States District Judge

SUMMARY JUDGMENT ENTERED MARCH 22, 1956

Filed: March 22, 1956.

In the District Court of the United States for the Northern District of Texas, Amarillo Division.

Natural Gas Pipeline Company of America, a corporation, Plaintiff,

v. Civil Action No. 2070,

D. D. Harrington, et al., Defendants.

This cause came on to be heard on the motion of plaintiff for summary judgment as authorized by Rule 56 of the Federal Rules of Civil Procedure, and it appearing to the Court from the pleadings, stipulations and affidavits filed in support of and opposition to such motion that there is no genuine issue as to any material fact, and that plaintiff, as a matter of law, is entitled to a judgment against defendants for the sum of $1,623,770.23, less the sum of $321,279.00 representing payments made by defendants' predecessor in interest to its royalty owners as increased royalty and for increased production taxes, and that plaintiff should be denied recovery of interest prior to judgment.

It is Ordered, Adjudged and Decreed that summary judgment be, and the same is hereby, entered in favor of plaintiff, Natural Gas Pipeline Company of America, a corporation, against defendants, D. D. Harrington, Stanley Marsh, Jr., Estelle Fariss Marsh, Isabel Marsh McCormick

and T. J. Wagner, Jr., jointly and severally, for the sum of $1,302,491.23, with interest from this date at 6 per cent per annum, and with costs.

Dated March 22nd, 1956.

(S.) JOE E. ESTES,
United States District Judge.

Approved as to Form:

(S.) DAVID T. SEARLS,
GENE M. WOODFIN,
Attorneys for Defendants.

(S.) D. H. CULTON,
Attorney for Plaintiff.

APPENDIX "D"

PERTINENT PROVISIONS OF THE NATURAL GAS ACT OF 1938

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfuless of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either

completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas

company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

ADMINISTRATION POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations

may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours. [52 Stat. 830 (1938); 15 U.S.C. § 717o]